Neutral Citation: **[2023] UKUT 00213 (TCC)**

Case Number: UT/2021-000106

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing Venue: **The Rolls Building,**
Fetter Lane, London EC4A 1NL

Corporation Tax – Gain on disposal of shareholding – Substantial Shareholding Exemption – interpretation of paragraphs 15A and 26 of Schedule 7AC Taxation of Chargeable Gains Act 1992 – whether 15A applies to a period when a company was not part of a group – no. Meaning of "Group" – must be more than one company.

Heard on: 10 May 2023
Judgment date: 31 August 2023

Before

THE HONOURABLE MR JUSTICE MICHAEL GREEN
JUDGE PHYLLIS RAMSHAW

Between

M GROUP HOLDINGS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Richard Vallat KC and Laura Ruxandu, counsel, instructed by Gowling WLG (UK) LLP

For the Respondents: John Brinsmead-Stockham KC, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. This appeal concerns the substantial shareholding exemption ("SSE") from the charge to corporation tax on gains arising on the disposal of a shareholding in a subsidiary by a company.

2. The appellant appeals against a decision of the First-tier Tribunal (Tax Chamber) ("the FTT") released on 12 March 2021 ([2021] UKFTT 69 (TC)). The FTT dismissed the appellant's appeal against HMRC's decision that the appellant was not entitled to exemption from corporation tax on chargeable gains arising on the sale of its shareholding in a subsidiary company.

3. Permission to appeal was granted by the FTT. The grounds of appeal are set out below. One of the grounds of appeal for which permission was granted was in relation to an issue not advanced before, and therefore not considered by, the FTT - the meaning of "group" for the purpose of the relevant statutory provisions.

4. The dispute between the parties to be decided by the Upper Tribunal is the correct statutory construction of section 170 of the Taxation of Chargeable Gains Act 1992 ("TCGA"), and paragraphs 15A and 26 of Schedule 7AC to TCGA.

BACKGROUND

5. The factual background is not in dispute. The facts were set out at paragraphs 5 to 18 of the FTT decision.

6. The appellant is a private company limited by shares and the entire issued share capital of the appellant was owned by Mr Peter Jeffreys.

7. Prior to 29 June 2015, the appellant traded as a stand-alone company providing services under NHS contracts to hospitals and clinics.

8. In 2015, Mr Jeffreys started to receive interest from potential buyers for the shares in the appellant. However, there were contingent tax liabilities arising from tax investigations by HMRC which would have made the appellant less attractive to buyers. Advice was therefore taken as to the most tax efficient way to structure any sale.

9. On 29 June 2015, the appellant incorporated Medinet Clinical Services Limited ("MCS") a private company limited by shares, as its wholly owned subsidiary.

10. On 30 September 2015, the appellant disposed of its trade and assets to MCS ("the hive down transaction").

11. On 27 May 2016, the appellant sold the entire issued share capital of MCS to Medinet Bidco Limited, a third-party purchaser, for a consideration of £54,874,324.

12. The appellant filed a company tax return for its accounting period 1 October 2015 – 31 May 2016, on 3 February 2017 which recorded that the appellant had realised a chargeable gain of £53,219,643, but it claimed that the entire gain was exempt from corporation tax on the basis that it fell within the SSE.

13. On 27 March 2019, HMRC issued a closure notice amending the appellant's return by disallowing the SSE relief so that the appellant became liable to corporation tax in the amount of £10,608,480.60. It is common ground that, if the share disposal is not eligible for SSE, then that is the correct figure for the appellant's liability to corporation tax.

RELEVANT LEGISLATIVE PROVISIONS

14. We set out and describe the legislative provisions in general terms below. All references, unless otherwise indicated, are to the TCGA and references to paragraphs are to paragraphs in Schedule 7AC to TCGA.

The SSE

15. Some context is necessary in order to construe the critical provision in paragraph 15A of Schedule 7AC. Generally (and in simplistic terms) disposals of a shareholding (upon which a gain is made) will give rise to a chargeable gain. In the case of a company this will result in a charge to corporation tax. SSE is provided for by section 192A and Schedule 7AC to TCGA. The provisions, at the relevant time, provided:

> "**192A Exemptions for gains or losses on disposal of shares etc**
>
> Schedule 7AC (exemptions for disposal of shares etc by companies with substantial shareholding) has effect."

> "**SCHEDULE 7AC**
>
> **EXEMPTIONS FOR DISPOSALS BY COMPANIES WITH SUBSTANTIAL SHAREHOLDINGS**
>
> **PART 1**
>
> **THE EXEMPTIONS**
>
> The main exemption
>
> **1** (1) A gain accruing to a company ("the investing company") on a disposal of shares or an interest in shares in another company ("the company invested in") is not a chargeable gain if the requirements of this Schedule are met.
>
> (2) The requirements are set out in—
>
> Part 2 (the substantial shareholding requirement), and
>
> Part 3 (requirements to be met in relation to the investing company and the company invested in).
>
> (3) The exemption conferred by this paragraph does not apply in the circumstances specified in paragraph 5 or the cases specified in paragraph 6.
>
> ...
>
> **7** The investing company must have held a substantial shareholding in the company invested in throughout a twelve-month period beginning not more than two years before the day on which the disposal takes place."

16. The appellant is the investing company and MCS is the company invested in. It is not disputed that the appellant met the conditions in Part 3 of Schedule 7AC. The appellant accepts that it did not meet the requirements of paragraph 7 in Part 2 because it only acquired the shares in MCS 11 months before the disposal.

17. Where paragraph 7 is not met, the period for which the investing company is treated as holding the shares can be extended in certain circumstances. The appellant relies on paragraph 15A which was inserted into Schedule 7AC by s.45 of, and paragraphs 6(1) and (2) of Schedule 10 to the Finance Act 2011. This is the critical provision for the purposes of this appeal and it provides as follows:

> "*Effect of transfer of trading assets within a group*
>
> 15A (1) For the purposes of this Part, the period for which the investing company is treated as holding a substantial shareholding in the company invested in is extended in accordance with sub-paragraph (3) if the following conditions are met.
>
> (2) The conditions are—
>
> (a) that, immediately before the disposal, the investing company holds a substantial shareholding in the company invested in,
>
> (*b*) that an asset which, at the time of the disposal, is being used for the purposes of a trade carried on by the company invested in was transferred to it by the investing company or another company,
>
> (c) that, at the time of the transfer of the asset, the company invested in, the investing company and, if different, the company which transferred the asset were all members of the same group, and
>
> (d) that the asset was previously used by a member of the group (other than the company invested in) for the purposes of a trade carried on by that member at a time when it was such a member.
>
> …
>
> (3) The investing company is to be treated as having held the substantial shareholding at any time during the final 12-month period when the asset was used as mentioned in sub-paragraph (2)(*d*) (if it did not hold a substantial shareholding at that time).
>
> (4) "The final 12-month period" means the period of 12 months ending with the time of the disposal."

18. It is accepted that the appellant met the conditions of paragraph 15A during the period that it was a member of a group from 29 June 2015 onwards, that is from when MCS became its wholly owned subsidiary. The appeal to the FTT and to us on the interpretation of this provision is concerned with "the contested period". This is the period between 28 May 2015 and 28 June 2015 when the appellant did not have any subsidiaries and was not a member of a group. (The appellant's new ground of appeal asserts that it was a member of a group in the contested period.)

19. It is also not in dispute that the appellant met the conditions of paragraph 15A(2)(a)-(c). It is the construction of paragraph 15A(2)(d) and paragraph 3 that are of central importance to this appeal.

Meaning of "Group"

20. The appellant now argues that it alone was a group for the purpose of the SSE exemption during the contested period, even though it accepts that there were no other members of the group. As indicated above, this issue was not considered by the FTT. It appears that the appeal before the FTT proceeded on the basis that both parties accepted (or at least no point was taken by the appellant on this issue) that the appellant was a stand-alone company in the contested period and not a member of a group.

21. "Group" is not specifically defined in the TCGA. Paragraph 26 in Part 4 of Schedule 7AC (interpretation) provides:

> "(1) In this Schedule -
>
> (a) "company" has the meaning given by section 170(9); and
>
> (b) references to a group, or to membership of a group, shall be construed in accordance with the provisions of section 170 read as if "51 per cent" were substituted for "75 per cent".
>
> (2) References in this Schedule to a "subgroup" are to companies that would form a group but for the fact that one of them is a 51% subsidiary of another company.
>
> (3) In this Schedule "holding company"—
>
> (a) in relation to a group, means the company described in section 170 as the principal company of the group;
>
> (b) in relation to a subgroup, means a company that would be the holding company of a group but for being a 51% subsidiary of another company.
>
> (4) In this Schedule "51% subsidiary" has the meaning given by Chapter 3 of Part 24 of CTA 2010."

22. Section 170 of TCGA (with the references to 75% replaced with 51% in accordance with paragraph 26 above) provides:

> "**Interpretation of sections 171 to 181**
>
> …
>
> (2) Except as otherwise provided—
>
> (b) subsections (3) to (6) below apply to determine whether companies form a group and, where they do, which is the principal company of the group;
>
> …
>
> (3) Subject to subsections (4) to (6) below—
>
> (a) a company (referred to below and in sections 171 to 181 as the "principal company of the group") and all its [51] per cent subsidiaries form a

group and, if any of those subsidiaries have [51] per cent subsidiaries, the group includes them and their [51] per cent subsidiaries, and so on, but

(b) a group does not include any company (other than the principal company of the group) that is not an effective 51 per cent subsidiary of the principal company of the group."

APPROACH TO STATUTORY INTERPRETATION

23. The general approach to interpreting statutory provisions is not contentious in this appeal. There are many cases setting out the modern approach. We must identify the meaning borne by the words in the particular context and have regard to the purpose of the provision seeking to construe it, as far as is possible, in a way which best gives effect to that purpose. These principles have recently been confirmed by the Supreme Court in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28 ("*PACCAR*"). (This judgment postdates the hearing but it is the latest encapsulation of the relevant principles of statutory interpretation.) In the judgment of Lord Sales (with whom Lord Reed, Lord Leggatt and Lord Stephens agreed, Lady Rose dissenting):

> "40. The basic task for the court in interpreting a statutory provision is clear. As Lord Nicholls put it in *Spath Holme,* at p 396, "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context."
>
> 41. As was pointed out by this court in *Rossendale Borough Council v Hurstwood Properties* (A) *Ltd* [2021] UKSC 16; [2022] AC 690, para 10 (Lord Briggs and Lord Leggatt), there are numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose. The examples given there are *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687 and *Bloomsbury International Ltd v Department for the Environment, Food and Rural Affairs* [2011] UKSC 25, [2011] 1 WLR 1546. In the first, Lord Bingham of Cornhill said (para 8):
>
> > "Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment." …

24. A court should not interpret a statute by a plain construction if it produces an absurd result. It is open to a court to adopt another possible interpretation (even if that is more strained) to avoid an absurd result. This is not without limits as explained by Lord Sales in *PACCAR*:

> "43. The courts will not interpret a statute so as to produce an absurd result, unless clearly constrained to do so by the words Parliament has used: see *R v McCool* [2018] UKSC 23, [2018] 1 WLR 2431, paras 23-25 (Lord Kerr of Tonaghmore), citing a passage in Bennion on Statutory Interpretation, 6th ed (2013), p 1753. See now Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), section

> 13.1(1): "The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature". As the authors of Bennion, Bailey and Norbury say, the courts give a wide meaning to absurdity in this context, "using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief". The width of the concept is acceptable, since the presumption against absurdity does not apply mechanistically but rather, as they point out in section 13.1(2), "[t]he strength of the presumption … depends on the degree to which a particular construction produces an unreasonable result". I would add that the courts have to be careful to ensure that they do not rely on the presumption against absurdity in order to substitute their view of what is reasonable for the policy chosen by the legislature, which may be reasonable in its own estimation. The constitutional position that legislative choice is for Parliament cannot be undermined under the guise of the presumption against absurdity…"

25. It may also be possible to omit words or read words into a statutory provision to correct obvious drafting mistakes. *In Inco Europe Ltd v First Choice Distribution* [2000] UKHL 15 Lord Nicholls said:

> "…It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. …
>
> This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation..."

GROUNDS OF APPEAL

26. There are three grounds of appeal:

(1) Ground A is as to the meaning of "group";

(2) Ground B concerns the correct interpretation of paragraph 15A(3); and

(3) Ground C concerns the correct interpretation of paragraph 15A(2)(d).

(1) Ground A – Meaning of "group"

Appellant's submissions

27. Mr Richard Vallat KC leading Ms Laura Ruxandu for the appellant developed this new argument during the course of his oral submissions. He argued that it is possible to have a

group consisting of just one company and that a company can be a "member of a group" without having any subsidiaries at all. In the absence of a statutory definition, a "group" would cover a group of one as a matter of ordinary language and logic. Mr Vallat KC relied heavily on the engaging example he gave of dividing a class of children into two groups: those who have reached a certain level; and those who have not. He submitted that one of the two groups could conceivably consist of only one member. Indeed, on this example, he would say that there could be a group with no members.

28. Therefore, in this case, Mr Vallat KC submitted that there was a group (of one) during the contested period consisting only of the appellant, which was the principal company of the group, and no other companies. From 29 June 2015, when MCS was incorporated and became the appellant's subsidiary, there was more than one company in the group, but it remained the same group. This means that paragraph 15A(2)(d) was satisfied during the contested period and the ownership period would be extended for the full 12 months.

29. Mr Vallat KC referred to paragraph 26(1)(b) of Schedule 7AC, and section 170(3) of TCGA arguing that "all its subsidiaries" (in s.170(3)) must cover the case where there is only one and possibly no such subsidiaries. The use of plurals is irrelevant. The draftsperson could have added the words "(if any)" but this would be to put the matter beyond doubt rather than to change the meaning. He argued that the words "all its subsidiaries" are only relevant if there is one or more subsidiary. He gave the example of an invitation to an event that was extended to "all your ex-partners". If there are no ex-partners this does not result in the invitee being unable to attend.

30. Mr Vallat KC submitted that there are (at least) two definitions of a group structure. For SSE, the requisite shareholding percentage is 51%, but 75% is required for other purposes. Therefore, a structure may or may not be a group relationship for different purposes.

31. Mr Vallat KC sought to distinguish the decision of the High Court in *Dunlop International AG v Pardoe* [1998] STC 459 ("*Dunlop*") (the relevant finding was not overturned on appeal) in which it was held that the definition of group in s.272(1) of the Income and Corporation Taxes Act 1970 ("ICTA") did not include a group of one. He submitted that s.170 is materially different to s.272(1) ICTA which defined a group by reference to a "principal company" which was in turn defined as a company of which another company was a subsidiary.

HMRC's submissions

32. Mr John Brinsmead-Stockham KC appeared on behalf of HMRC and he argued that the concept of a "group" does not cover a group of one as a matter of ordinary language and logic. He referred to the Shorter Oxford English Dictionary and the principal definition of "group" therein. Although it would not be impossible for the SSE legislation to define a "group" to include single companies, it would be contrary to the ordinary meaning of the word and would require clear language to do so.

33. Mr Brinsmead-Stockham KC said that it is clear from the express terms of the relevant legislation that a "group" for the purposes of SSE must consist of at least two companies. He drew attention to s.170(2)(b) of TCGA and the use of the plural in this provision which he said amounted to an express stipulation by Parliament that a "group" in this context must

consist of more than one company. That analysis is reinforced by the requirement that any "group" must have a "principal company".

34. The reference in s.170(3) of TCGA to "all its [51] per cent subsidiaries" is predicated on the existence of one or more such subsidiaries and operates to ensure that all of those subsidiaries are included within the relevant "group".

35. Mr Brinsmead-Stockham KC submitted that *Dunlop* shows that a single company could not constitute a "*group*" under the earlier definition of that concept for capital gains tax purposes in s.272(1) of ICTA . The appellant had not identified anything which suggested that Parliament, when enacting the current definition, intended to change the position such that it became possible for a group of one to exist.

Discussion

36. The word "group" is not directly defined in the relevant legislation although there are defining provisions. Parliament could have chosen to provide a specific definition. It has not done so for the obvious reason, in our view, that its meaning is sufficiently clear.

37. At paragraph 49 of *PACCAR* Lord Sales said:

> "The fact that Parliament provides a statutory definition of a term means that it is not satisfied that the term itself is sufficiently clear on its own. Where Parliament has taken the trouble to provide a definition, it is the words of the definition which are the primary guide to the meaning of the term defined…"

38. We conclude that the ordinary and natural meaning of the word "group" requires there to be more than one in the group. The Shorter Oxford English Dictionary gives a primary definition of "two or more people, animals, or things standing or positioned close together so as to form a collective entity". Most definitions refer to or assume a number of people or things. The definition at 2e is: "a number of commercial companies together with the holding company controlling them".

39. As explained above, Mr Vallat KC placed much reliance on his schoolchildren example and the possible group of one. We consider that such use of the word "group" in that context is perhaps a more colloquial one and has more the sense of a category and its use depends on there being more than one group. When "group" is used in relation to companies, it is not to compare different groups; rather it is to define whether a single group exists or not. The schoolchildren example assumes that there is one group (the class of schoolchildren) that necessarily has more than one member and it is being divided into smaller groups. The statutory provisions are concerned with whether a group has been formed and are clearly distinguishing a group from a stand-alone company. Mr Vallat KC was forced into the submission, which we think is misconceived, that a stand-alone company is a one member group for this purpose. In our view, a group of companies is only formed if a relationship between a parent and a subsidiary comes into existence. Therefore, it necessarily has more than one member.

40. We think this is really very straightforward and the appellant was right to have conceded before the FTT that it was not a member of a group during the contested period. We agree with Mr Brinsmead-Stockham KC that *Dunlop* cannot be distinguished on the basis that s.272(1)(b) of ICTA is materially different to s.170(3) of TCGA. The only difference is the reference to a "principal company" in the former, whereas the latter only

refers to a "company" (albeit that it then states that this is the "principal company of the group"). Both sections seek to define what combination of companies forms a group and clearly assume that it must include a principal company and its subsidiary. There is nothing to suggest that Parliament sought to change the position in the TCGA following *Dunlop*.

41. Mr Vallat KC submitted that under the Interpretation Act 1978 words in the plural include the singular, but that is subject to any contrary intention appearing from the words of the statute. Section 170(2)(b) of TCGA provides for subsections (3) to (6) to apply to determine whether companies form a group and, where they do, which is the principal company of the group. Section 170(3)(a) of TCGA then specifies that a group is formed by a company and its subsidiaries (and any subsidiaries of the subsidiaries). That can only be read as identifying that a group exists when a company has at least one subsidiary. In other words, there has to be more than one company to form a group.

42. Mr Vallat KC sought to persuade us that s.170(3)(a) of TCGA does not require there to be subsidiaries of a company to form a group and that all it is doing is identifying which is the principal company of the group where a company has subsidiaries. He said that where a company does not have subsidiaries, s.170(3)(a) is irrelevant and does not assist in determining whether a stand-alone company can itself form a group. We do not see how it can be read in this way. As referred to above, s.170(2)(b) states that subsection (3) is to determine whether "companies form a group" and it is only if they do that it then seeks to define which is the principal company of the group. Then s.170(3)(a) of TCGA does just that and defines whether a group has been formed by reference to whether a company has one or more subsidiaries.

43. The suggestion that the words "(if any)" should be read in after "subsidiaries" would lead to a very strained reading of the subsection and an absurd result. It would involve reading the subsection as follows in the event of there being a stand-alone company: "a company…form(s) a group". Mr Vallat KC was ultimately forced to submit that every single company, for the purposes of the TCGA, was a group: if it is a stand-alone company then it is a group of one; if it has subsidiaries, then it is the principal company of the group formed of itself and its subsidiaries. This interpretation, in our view, undermines the purpose of s.170 of TCGA which is to define "whether" companies form a group. That assumes that there can be a situation where there is no group. But Mr Vallat KC's argument depends on there always being a group in existence for every company. It also goes against the whole point of defining a group and for tax legislation being adjusted to cater for groups of companies as opposed to stand-alone companies.

44. This is reinforced by the actual provisions that this is relevant to and their purpose. Paragraph 15A of Schedule 7AC is headed "effect of transfer of trading assets within a group". So it is designed to extend the period when there is a group in existence as opposed to when there is not. Then paragraph 15A(2)(c) refers to two or more companies as there must have been a transfer between two companies that were members of the same group. And the reference in paragraph 15A(2)(d) to a "member of the group" is to the self-same group as is referred to in paragraph 15A(2)(c), which necessarily consisted of more than one company. On Mr Vallat KC's construction, the reference to "member of the group" in paragraph 15A(2)(d) can be to a group of one but that would not then be the same group that is referred to in paragraph 15A(2)(c).

45. There are also other provisions in Schedule 7AC that support our analysis that a group must consist of more than one company. Paragraph 26(3) provides that "holding company" in relation to a group means the company described in s.170 of TCGA as the principal company of the group. This reinforces our view that the requirement in s.170 is that the principal company must have a subsidiary to form a group, as it does not make sense to call a stand-alone company a "holding company". Further weight can be drawn from a consideration of paragraphs 20 and 21. Paragraph 20 defines a "trading company". Throughout, the singular is used. This contrasts with paragraph 21 which defines a "trading group". If a group could consist of only one company it would be unnecessary to have these separate definitions.

46. Despite Mr Vallat KC's valiant attempt to persuade us otherwise, for the above reasons, we find that there is no merit at all in this ground of appeal. The meaning of "group" in paragraph 15A is that there is more than one company, one of which must hold at least 51% of the shares in a subsidiary company. That is its ordinary and natural meaning. It is also consistent with the context and purpose of the relevant legislative provisions that a group of companies cannot consist of one stand-alone company and must comprise at least two companies. We reject Ground A of the appeal.

(2) Ground B – interpretation of paragraph 15A(3)

47. Although the issues that arise on the interpretation of paragraph 15A(3) overlap, we deal with this ground B under three separate headings. This mirrors the FTT's approach.

i) <u>Ordinary and natural meaning of the words used</u>

The findings of the FTT

48. Dealing firstly with the natural or ordinary meaning of the words used the FTT found:

> "80. In my view, the natural or ordinary meaning of paragraph 15A(3) is the one put forward by HMRC. Paragraph 15A(3) restricts the period to be treated for the purposes of paragraph 7 as periods of ownership in the shares in the target company to such period as complies from time to time with paragraph 15A(2)(d), that is the period during which the assets were held and used for the purposes of a trade by a company that was at the time of such use a member of the group.
>
> 81. I do not accept Mr Vallat's interpretation is a natural meaning of the legislation, that only the "use" aspect of paragraph 15A(2)(d) is imported into paragraph 15A(3). Mr Vallat did not on this basis press the point with any conviction but I must consider it. This is not a natural reading of the provisions and is not supported by any discernable purpose in the legislation.
>
> 82. On the contrary, Mr Vallat's interpretation risks expanding paragraph 15A(3) to apply where the trade is carried on by a third party company which joins the group at a later date. Mr Vallat accepted paragraph 15A(2)(d) was intended to stop such a result in the normal circumstances of a pre-existing group. However, any interpretation must be capable of general application and in my view limiting the conditions in paragraph 15A(2)(d) to the "use" condition, as Mr Vallat suggests, risks crediting the

> selling company with the period during which the use of the assets was by a third party company. That would represent a significant widening of the legislation and points against Mr Vallat's interpretation."

Appellant's submissions

49. Mr Vallat KC submitted that on a correct construction of paragraph 15A there is no need to read in the temporal aspect of paragraph 15A(2)(d) into paragraph 15A(3). He focused on the word "used", arguing that the draftsperson could have said "when the condition in sub-paragraph (2)(d) was met" rather than the curious language "used as mentioned". It is only the use as described in sub-paragraph (2)(d) that is imported into paragraph 15A(3). He further argued that the clear purpose of paragraph 15A is to give relief where the economic ownership of the relevant trade and assets has remained the same regardless of the precise corporate structure. Paragraph 15A(3) should not be construed as requiring the corporate structure to have a certain form throughout the 12-month period, as it expressly recognises that the asset may be used when the investing company does not hold a substantial shareholding. The construction of paragraph 15A(3), focussing on use, not group membership, is reinforced by the fact that the company disposed of does not need to be a member of the group at the time of that disposal (or at any time before or after the asset transfer).

HMRC's submissions

50. Mr Brinsmead-Stockham KC focused on the clear words of paragraph 15A(2)(d) that the asset was being used "at a time when it was such a member". Those words are an integral part of the condition in paragraph 15A(2)(d). During the contested period the appellant was not a member of any "group". On the ordinary and natural meaning of the words of paragraph 15A(2)(d) and 15A(3), there can be no deeming that the appellant held a substantial shareholding during the contested period. He cited *Williams v Central Bank of Nigeria* [2014] AC 1189, at [72] for the proposition that the court cannot ignore the plain meaning of words that Parliament has used.

Discussion

51. Paragraph 15A(3) refers to paragraph 15A(2)(d). The question raised by the appellant is whether it is referring to all the elements of paragraph 15A(2)(d) or just to the "use" element. In our view there is nothing to indicate in paragraph 15A(3) that Parliament did not intend to incorporate all elements of paragraph 15A(2)(d), including in particular the "temporal" element as to when the company was a member of a group.

52. Contrary to Mr Vallat KC's argument, paragraph 15A(1) makes clear that the "treated" period will only be extended in accordance with paragraph 15A(3) **if** all the conditions in paragraph 15A(2)(a)-(d) are met. In fact there is no dispute between the parties that all of the conditions in paragraph 15A(2)(d) were met. There are three sub-conditions in paragraph 15A(2)(d), namely, the asset transferred was: i) previously used by a member of the group; ii) the asset was used for the purpose of a trade by the member; and iii) that both conditions i) and ii) must have been met at a time when the member was a member of the group. The reason why the appellant met the condition in paragraph 15A(2)(d) is that it was a member of the group from 29 June 2015 when MCS was incorporated as its wholly-owned subsidiary. But paragraph 15A(3) is looking at the prior period, the contested period, when it was not a member of a group.

53. Mr Vallat KC submitted that the appellant only needed to meet the requirements of sub-conditions i) and ii) of paragraph 15A(2)(d) because sub-condition iii) is not required to be met for the purposes of paragraph 15A(3). We do not consider that paragraph 15A(3) can sensibly be read as removing sub-condition iii), the "temporal" aspect, from the requirements of paragraph 15A(3).

54. The words in parenthesis at the end of paragraph 15A(3) "(if it did not hold a substantial shareholding at the time)" are important. The focus of paragraph 15A is a period, or periods of time, when a substantial shareholding was not held or not held for the continuous period required by paragraph 7. Paragraph 15A(3) is therefore looking at what was happening with regard to the subsequently transferred asset during that period/s of time within the group. This is both a temporal and a quality of use aspect. The investing company, i.e. the appellant, can only benefit from the extended "deemed" period of ownership if the asset was being used during the particular period/s by a member of the group.

55. We agree with the FTT's general analysis and its finding that paragraph 15A(3) restricts the period to be treated as having held a substantial shareholding to the period during which the assets were held and used for the purposes of a trade by a company that was at the time of such use a member of the group.

ii) Purpose of Paragraph 15A

The findings of the FTT

56. The FTT was unable to discern the purpose of paragraph 15A with clarity from the words of the provision or from the extra statutory material insofar as it considered whether the purpose of the legislation "extends to include providing relief for stand-alone trading companies acquiring and selling subsidiaries within 12 months" (paragraph 79). It found that its conclusion on the construction "produces what might be described as at the very least as the oddity or arbitrariness of SSE applying or not depending on whether there has been a separate, possibly dormant, subsidiary or other group company owned for the previous 12 months*"* (paragraph 83). For the reasons we set out below we disagree with the FTT's conclusion on the discernibility of the purpose from the provision itself and the extra statutory materials.

57. The issue identified by the FTT, having concluded that the provision on its ordinary and natural reading did not provide relief on the facts of the case, was in reality a question as to whether the legislative provision so interpreted was contrary to its purpose such that the construction led to an absurd result or produced injustice.

The appellant's submissions

58. Mr Vallat KC argued that there is no policy justification for the restriction - it creates an arbitrary discrimination/disparity of treatment between a stand-alone company and another company in the same circumstances, but which also fortuitously had a dormant subsidiary in the contested period. On the FTT's construction two companies in identical economic situations are treated differently.

59. Mr Vallat KC submitted that the appellant's purposive interpretation of paragraph 15A(3) avoids the arbitrary discrimination which would otherwise arise under the FTT's

interpretation and is more in line with the policy objectives which led to the introduction of paragraph 15A, supported by the professional commentary in the tax journals.

60. In relation to the Explanatory Notes to the Finance Bill, Mr Vallat KC submitted that paragraph 27 does not help either way and it is a high-level summary, so one cannot read too much into it.

HMRC's submissions

61. Mr Brinsmead-Stockham KC argued that the purpose of paragraph 15A is to extend the availability of SSE in circumstances where a trade has been carried on within a group, by a member of that group, prior to a share sale and represents a coherent purpose for Parliament to have pursued. This analysis is consistent with the correct approach to purposive construction set out by the Court of Appeal in *Astall v RCC* [2010] STC 137.

62. Whilst paragraph 15A(2)(d) may refer to the use of assets at a time when the investing company does not have any 51% subsidiaries, this is the point of paragraph 15A. Whilst paragraph 15A does not require the company invested in to be a member of a group at the time that any share disposal occurs, it is a requirement for paragraph 15A to apply that the relevant assets were transferred to that company at the time when it was a group member. Both of those propositions are consistent with paragraph 15A's purpose of relaxing the SSE qualifying conditions for corporate groups in the context of the transfer of assets within such groups.

Discussion

63. In accordance with the authorities to give the statutory provision a purposive construction we need to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction answers to the statutory description. Our analysis of the wording of the provision on an ordinary and natural meaning above is relevant. As we set out above, as a matter of ordinary construction, paragraph 15A(3) does not divide up paragraph 15A(2)(d) - the last sub-condition is as integral as the first two. In other words, there is no separate "use" or "temporal" aspect – there is only one aspect, namely whether the asset was used for a trade purpose by a member of the group at a time when it was a member of the group. Paragraph 15A(2)(c) is specific to assets transferred between group members. The wording of the provision is entirely focussed on groups of companies and what is happening to assets used by members of the group when a member of the group. We do not accept the submission that the corporate structure is not the focus or that the purpose of the provision is to apply the relief where the economic ownership of the relevant trade and assets has remained the same. The nature of the transactions that can be identified from the provision do not reflect such a purpose outside of a group setting.

64. As stated above, the heading is "Effect of transfer of trading assets within a group". Our view is that the heading accurately captures the purpose of the provision. The significance of headings was recently described in *HM Revenue & Customs v Naghshineh* [2022] EWCA Civ 19:

> " [41] On the issue of statutory construction, we were taken to Bennion, Bailey and Norbury on Statutory Interpretation (8th edn) which suggests that a heading is part of an Act and may be considered in construing an Act, provided that due account is taken of the fact that its function is merely to serve as a brief guide to the material to which

> it relates and that it may not be entirely accurate (see para 16.7). The parties both accepted that general proposition, as do I."

65. Schedule 7AC is a relief or an exemption from tax that would otherwise be chargeable on disposals of shareholdings by companies. The starting point in such a context, in our view, is that any strict conditions must be met. One of these is paragraph 7 which requires that the substantial shareholding must be held for a continuous 12-month period. This is a strict requirement. There is nothing in paragraph 15A to suggest that there is any general relaxing of that requirement. On the appellant's case a company could use the assets for trade and form a group, hive down the assets and sell its substantial shareholding within a very short period and benefit from an exception to a strict requirement. This, in our view, undermines the requirement to hold the shareholding for 12 months.

66. The purpose of the provision, discerned from the words used in the legislation, is to extend the availability of SSE to transactions within a group where an asset transferred has been used within the group by a member throughout the 12-month period even though the substantial shareholding in the hive-down subsidiary had not been held for that whole 12-month period. It is a benefit provided to a group of companies, rather than a stand-alone company.

67. We were referred to the Explanatory Notes to the Finance (No.3) Bill, March 2011. In *PACCAR,* Lord Sales at [42] said:

> "42. It is legitimate to refer to explanatory notes which accompanied a Bill in its passage through Parliament and which, under current practice, are reproduced for ease of reference when the Act is promulgated; but external aids to interpretation such as these play a secondary role, as it is the words of the provision itself read in the context of the section as a whole and in the wider context of a group of sections of which it forms part and of the statute as a whole which are the primary means by which Parliament's meaning is to be ascertained."

68. The Explanatory Notes confirmed that the purpose of paragraph 15A is to permit SSE to apply in relation to specific circumstances that arise within groups of companies. This is made clear in the following paragraphs:

> "26. Paragraph 6(1) introduces amendments to the Substantial Shareholding Exemption in Schedule 7AC to TCGA that will allow the exemption to apply in situations involving the disposal of part of a group's trading activity that has been transferred to another company in the group.
>
> 27. Paragraph 6(2) inserts a new paragraph 15A into Schedule 7AC which treats the minimum 12-month substantial shareholding requirement as having been met for the period that assets were used for a trade conducted by the group before being transferred to the company being disposed of…."

69. We were also referred to the HM Treasury Consultation – Simplification Review: Capital Gains Rules for Groups of Companies, 22 February 2010. This document demonstrates that the mischief which the introduction of paragraph 15A was intended to address was to deal with de-grouping and the SSE relief as applicable to divisionalised businesses traded in a group. Relevant paragraphs include:

> 4.5 A significant concern with the current degrouping charge rules, expressed by a number of business representatives, is the way that these rules interact with the

provisions in the SSE in Schedule 7AC TCGA. A degrouping charge may arise in respect of a trade asset owned by a trading company, yet the share sale which gives rise to the degrouping event would itself be an exempt disposal for chargeable gains purposes by virtue of the provisions in the SSE. The imposition of a degrouping charge in respect of an asset used for a trade in an otherwise exempt sale was one of the major irritants highlighted by business representatives. This particularly concerned groups that organise their business on a divisionalised basis. Although a disposal of a single business will often involve putting assets into a group company prior to sales, the benefits of the SSE may not be available. Stakeholders could see no justification for preventing the exemption applying in cases involving this type of restructuring before a sale.

4.6 As noted in the July 2009 discussion document, in order to be fully effective for divisionalised businesses that restructure in advance of a business disposal, this option would also require an amendment to the rules in Schedule 7AC TCGA regarding the period of time that the company has carried on the trade prior to disposal, so that account is taken of periods where the trade is carried on by other members of the group.

4.7 In particular, this would mean that in cases where assets that have been used for the purposes of a trade by the group are transferred to a newly incorporated company that continues to use them for a trade, the condition requiring that the investing company have held shares in a trading company for a period of 12 months would be modified…

4.18 Where assets that have been used for the purposes of a trade by the group are transferred to a company then the current requirement that the investing company must have held shares for a period of 12 months for the SSE to apply will be modified. The investing company would be treated as having the necessary holding of shares in a qualifying company for the period that those assets were being used for a trade conducted by the group. This would allow the exemption to apply when trading activities are placed within a newly incorporated group company which is then sold out of a trading group, to the benefit of groups that have various trading activities conducted within single companies."

70. The proposals were expressly contemplated in the context of a group. There is nothing in the Explanatory Notes or the consultation document that casts doubt on the purpose that we discerned above. They are entirely in accordance with our view.

iii) Absurdity or injustice

71. The FTT, having considered the authorities, found:

"98. … that given Parliament's intention on the point in this appeal is unclear, HMRC's interpretation of paragraph 15A(3) cannot amount to a wholly unreasonable result sufficient to justify a strained interpretation. Even if it did, on which I am not persuaded, there is no permissible even if strained interpretation of the legislation which would address the issue."

72. Although not part of the case advanced by the appellant before the FTT it considered whether it would be appropriate to read wording into the legislation. It concluded that there was no plain drafting mistake given its findings that the purpose of the legislation was not clear.

The appellant's submissions

73. Mr Vallat KC submitted that the absurdity of the result produced by the literal construction is emphasised by the fact that SSE would have been available if the disposal was a month later. He questioned whether the delay of a month matters where the assets were used for trade throughout a 12-month period. The tax code is concerned with substance not form. There is no requirement in paragraph 15A for the same group to have been in existence throughout the 12-month period – the purpose of the provision was to provide equality between companies operating in divisions rather than through subsidiaries. The corporate structure is not the focus of paragraph 15A(3). Paragraph 15A is intended to apply where the economic ownership of the relevant trade and assets has remained the same.

74. SSE could be claimed by a company with a dormant subsidiary. Parliament could not have intended to tax differently economically equivalent structures and, in reliance on various tax journals, Mr Vallat KC argued that the intention was to apply the relief to stand-alone companies.

HMRC's submissions

75. Mr Brinsmead-Stockham KC submitted that there is no basis for the assertion that paragraph 15A is intended to apply where "the economic ownership of the relevant trade and assets has remained the same". Paragraph 15A is instead specifically framed by reference to the requirement for a "group". The argument that "the corporate structure…is not the focus of paragraph 15A(3)" completely ignores the fact that paragraph 15A(3) applies by reference to paragraph 15A(2)(d) which requires that a specific group existed. "Group" is a defined concept that is directly concerned with "the corporate structure" of the relevant entities. Neither the purposive interpretation or the ordinary and natural reading of the words in the provision produce an absurd result.

Discussion

76. We have not considered the tax journals; they are not an aid to construction. Even if Parliament had wished to achieve a particular result (we do not consider that it did), if the statutory language adopted is for a narrower purpose it is no part of an exercise in purposive construction to give effect to a wider outcome than can properly be borne by the statutory language. That would amount to rectification of legislation.

77. There is no doctrine of UK tax law that economically equivalent structures should be taxed the same. The appellant was a stand-alone company in the contested period, which is in a different position to a company that has a dormant subsidiary as it is considered for tax purposes to be a group of companies. There may be tax advantages and disadvantages to both structures. Groups of companies are often treated differently for tax purposes to stand-alone companies (e.g., in the treatment of transfers/disposals within groups).

78. In *Berry v Revenue and Customs Commissioners* [2011] STC 1057 in summarising the development of the *Ramsay* principal Lewison J, as he then was, said:

> "31 …
>
> (vi) … the more comprehensively Parliament sets out the scope of a statutory provision or description, the less room there will be for an appeal to a purpose which is not the literal meaning of the words…"

79. Paragraph 15A is in our view prescriptive in nature. This does not mean that it is less susceptible to a purposive construction but, as we have found, it prescribes conditions that must be met. They cannot be ignored to achieve a wholly different outcome. The anomalous situation that the appellant relies upon may or may not have been contemplated by Parliament, but it does not affect the analysis of the purpose of the provision, which was, as we described above, to extend SSE in certain circumstances solely for groups of companies. As the Supreme Court reminded us in *PACCAR* it is not for judges to interfere with the "policy chosen by the legislature, which may be reasonable in its own estimation. The constitutional position that legislative choice is for Parliament cannot be undermined under the guise of the presumption against absurdity…"(Paragraph 43)

80. The fact that the appellant sold its substantial shareholding a month too early to qualify for relief is not a reason to adopt a strained interpretation of the provision. It is curious that the appellant simply failed to comply with a specific time requirement. Paragraph 15A has prescribed conditions to be met. With regard to paragraph 7, bright lines are a common feature of tax legislation particularly in respect of time limits. We do not see the bright line of the 12-month holding requirement as unjust even on the hypothetical situation of selling only one day early.

81. We do not agree that the purposive construction of the provision that we have discerned above produces an absurd result or that any injustice arises. At its highest it might produce an anomalous result but that is insufficient to depart from the clear meaning.

82. We reject the appellant's arguments for the above reasons. This ground of appeal fails.

(3) Ground C – interpretation of paragraph 15A(2)(d)

83. The arguments on this ground were not put to the FTT, or at least not in the way advanced before us, but it did consider whether words ought to be read into the legislation. It concluded:

> "101 However in this appeal, for the reasons set out above, the intended purpose of the legislation on the issue in this appeal is not clear. Accordingly, any attempt to read in wording must fail on the first of Lord Nicholls' three matters on which the court to be "abundantly sure". Further, whilst it is tempting to adopt the role of parliamentary counsel, I am conscious of Lord Nicholl's warning as to the appearance of judicial legislation and the need to limit the exercise of this power to "plain cases of drafting mistakes". I am not persuaded this is such a case.
>
> 102. Accordingly, whether wording could be devised to cover the "gist or substance of the alteration", it is in my view inappropriate for me to do so in this appeal."

84. This ground overlaps considerably with ground B with regard to what the appellant argues is the purpose of the provision. We have already addressed the purpose above and therefore only set out in brief the arguments below.

The appellant's submissions

85. Mr Vallat KC argued that additional words should be read into paragraph 15A(2)(d) to address the allegedly anomalous situation of a dormant subsidiary. He submitted that additional words must be read into paragraph 15A(2)(d) to give effect to the purpose of paragraph 15A. The concept of group membership is used in para 15A to capture continuity of economic ownership. It fails to do this in the case of a stand-alone company if read literally. He suggested that the words to be read into paragraph 15A(2)(d) should be that the asset was used by "the investing company or" a member of the group, for the purposes of a trade carried on by that company at a time when it was "the investing company or a member of the group".

86. Mr Vallat submitted that it was an obvious mistake to discriminate against a stand-alone company compared to a company with a dormant subsidiary. There is no justification for doing so, he said. He referred to *Pollen Estate Trustee Co Ltd v HMRC* [2013] EWCA Civ 793 ("*Pollen*") arguing that the taxpayer could have changed its structure to benefit from the relief.

HMRC's submissions

87. Mr Brinsmead-Stockham KC said that the concept of "economic ownership" is not referred to in paragraph 15A. The legislation expressly relies on the concept of a "group". There is no tenable basis identified by the appellant for reading in the suggested words. He relied on *Hyman v HMRC* [2022] STC 358 and submitted that to do so would require the Tribunal "to graft a provision on to a statute…a practice which is entirely foreign to our jurisprudence". The appellant has not identified anything in either the statutory or extra-statutory materials to suggest that Parliament intended paragraph 15A to apply in those circumstances. The form of wording proposed by the appellant would potentially deem the investing company to have held a substantial shareholding in the company invested in for periods when the investing company was a member of a different group to that which it was a member of at the time when it transferred the assets to the company invested in. That would be directly contrary to the actual terms of paragraph 15A.

Discussion

88. To read words into a statute there is a very high bar. There must be an obvious drafting error that goes against the clear purpose of the statute. In *Inco Europe Inco Europe v First Distribution* [2000] 1 WLR 586, Lord Nicholls said at 592:

> "99 It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words….This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the

> precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise, any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation."

89. In our view Parliament chose to include only the words "member of the group" deliberately because it was intending only to cover transfers within groups. There is no mistake in the drafting in our view. We agree with HMRC that the concept of economic ownership is not referred to in the statutory provision or in the extra statutory materials.

90. In *Pollen,* Lewison LJ was absolutely clear as to what Parliament's purpose was and concluded that Parliament had made a mistake in the drafting. In this case Parliament was focused on extending the relief for groups of companies, not a stand-alone company.

91. We also accept HMRC's argument that reading in the words suggested extends the relief to a situation where the "investing company" might have been part of a completely different group to that of which it was part when it came to dispose of the shares and that this might have unintended consequences.

92. The words used in paragraph 15A have a readily understandable ordinary and natural meaning and accord with the intended purpose. There is no basis upon which to conclude that there is any drafting error in the provision to allow us to deviate from the meaning or to read in words.

93. This ground of appeal must also fail for the above reasons.

Conclusion and Disposition

94. Although we arrived at a different conclusion to the FTT on the discernibility of the purpose of the legislation we agree with the FTT's overall conclusions at paragraphs 98 and 101 on the absurdity and correcting drafting mistakes issues. We agree with the FTT's finding that paragraph 15A(3) restricts the period to be treated as holding a substantial shareholding to the period during which the assets were held and used for the purposes of a trade by a company that was at the time of such use a member of the group. "Group" given its ordinary and natural meaning must consist of more than one company. In the context of the legislative provisions and their purpose a group of companies cannot consist of one stand-alone company.

95. For the reasons set out above the appellant's appeal on all grounds is dismissed.

MR JUSTICE MICHAEL GREEN
JUDGE PHYLLIS RAMSHAW

Release date: 31 August 2023